TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~458.~~ 145

GEORGE J. PUMPELLY, PLAINTIFF IN ERROR,

vs.

GREEN BAY AND MISSISSIPPI CANAL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

FILED JUNE 11, 1870.

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1 Circuit court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America, for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the eleventh day) of April, A. D. 1870—present, the honorable Andrew G. Miller, district judge, presiding; Charles S. Hamilton, marshal; Edward Kurtz, clerk—among other the following proceedings were had, to wit:

GEORGE J. PUMPELLY, PLAINTIFF,
vs.
GREEN BAY & MISSISSIPPI CANAL COMPANY, defendant. } At law.

Be it remembered that heretofore, to wit: on the 21st day of August, A. D. 1867, came the above-named plaintiff, by his attorney, Mr. Gillet, and filed his præcipe for a summons against the above-named defendant, as follows, to wit:

Præcipe for Summons.

United States circuit court, district of Wisconsin.

GEORGE J. PUMPELLY,
vs.
THE GREEN BAY & MISSISSIPPI CANAL COMPANY. } Trespass on the case. Da's, $30,000.

The clerk of said court will please issue summons in the above-entitled action in a plea of trespass on the case, ret'bl 2nd Monday of Sept. next.

J. M. GILLET, *Pl'ff's Att'y.*

AUG. 20, 1867.

And also filed bond for costs, which is approved. Whereupon a summons issued as follows:

2 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon the Green Bay & Mississippi Canal Company to appear before the circuit court of the United States of America for the district of Wisconsin, in the seventh circuit, at the United States court room, in the city of Milwaukee, on the second Monday of September ensuing, then and there to answer unto George J. Pumpelly in a plea of trespass on the case, to his damage, thirty thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this twenty-first day of August, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-second.

EDWARD KURTZ, *Clerk.*

J. M. GILLET, *Attorney.*

3 Summons returned. Served on the within-named Green Bay and Mississippi Canal Company by showing this summons to A. L. Smith, secretary, (the president not to be found,) and by delivering to him personally a copy thereof, this 23d day of August, 1867. Cassius Fairchild, marshal, by M. D. McGrath, deputy. Fees, $8 80.

4 SEPTEMBER 5, 1867.—This day came the defendant, by its attorneys, Messrs. Stevens, Lewis & Flower, and filed its appearance, as follows:

Appearance.

United States circuit court, district of Wisconsin.

GEORGE J. PUMPELLY
vs.
GREEN BAY AND MISSISSIPPI CANAL COMPANY.

SIR: We have been retained and hereby appear for the defendant in the above-entitled action, and you will please enter our appearance herein.

Madison, Wis., Sept. 4, 1867.

Yours, &c.,

STEVENS, LEWIS & FLOWER,
Atty's for Def't.

H. L. PALMER, Esq'r,
Of counsel.

To EDWARD KURTZ, Esq'r,
Clerk U. S. Cir. Court, Milwaukee, Wis.

DECEMBER 2, 1867.—This day came the plaintiff, by his attorney, and filed his declaration as follows:

Declaration.

United States circuit court for the district of Wisconsin, of the second Monday of September, 1867.

UNITED STATES OF AMERICA, *district of Wisconsin:*

5 George J. Pumpelly, who is a citizen of the State of New York, plaintiff in this suit by J. M. Gillet, his attorney, complains of the Green Bay and Mississippi Canal Company, the defendant in this suit, an incorporated company created by and under the laws of the State of Wisconsin, of a plea of trespass on the case:

For that whereas before and at the times of the committing of the grievances by the defendant hereinafter mentioned, the plaintiff was and thence hitherto hath been and still is lawfully possessed of divers, to wit, six hundred and forty acres of land with the appurtenances, situate in the county of Fond du Lac, in said district, and known and particularly described as section one, (1,) in township number fifteen (15) north, of range number seventeen (17) east.

And whereas also before and at the times of the committing of the grievances by the defendant hereinafter mentioned, the defendant was engaged in the making, erecting, and building a certain dam or obstruction in, upon, and across the north channel of Fox River, or outlet of Lake Winnebago, on the north side of an island at the foot of said

lake, commonly called and known as Doty Island, in the county of Winnebago, in said district, near to the said lands so possessed by the plaintiff. Yet the said defendant, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff, in respect of the occupation of the said lands, whereof he was so possessed, afterwards and whilst the plaintiff was so possessed as aforesaid, to wit, on the 1st day of August, in the year A. D. 1861, and on
6 divers other days and times between that day and the 1st day of August, A. D. 1867, so carelessly, negligently, unskillfully, inartificially and improperly made, erected, and built, and kept and continued the said dam or obstruction in, upon and across the said north channel or outlet of the said Lake Winnebago, on the north side of said island, commonly called and known as Doty Island, from the times of the respective doings and performings thereof until the day and year last aforesaid, so carelessly, negligently, unskilfully, inartificially, improperly, and insufficiently, done and performed as aforesaid, that afterwards, to wit, on the said 1st day of August, in the year A. D. 1861 aforesaid, by reason of the careless, negligent, unskilfull, inartificial, improper, and insufficient manner in which the said work was done and performed, and kept and contrived as aforesaid, the waters then being in the said north channel of the said Fox River or outlet of Lake Winnebago, on the south side of the said island, commonly called and known as Doty Island, and the waters of the said Lake Winnebago, wrongfully and with great force and violence overflowed divers, to wit, two hundred acres of meadow land and two hundred acres of pasture land, respectively parcel of the said land so possessed by the said plaintiff, as aforesaid, and staid and continued in and upon the same respectively for a long space of time, to wit, six years; then and during that time washed up, tore up and subverted divers, to wit, five hundred
7 trees, and washed away and destroyed divers, to wit, one hundred acres of said land of the said plaintiff, there then growing and being, and by reason of which said overflowing not only were the ditches and drains of the plaintiff on his said lands then being greatly choked up, and the said lands greatly saturated with water, and dirtied and injured with and by a sandy and dirty deposit thereupon, thereby brought and occasioned, and otherwise much lessened in value, and the plaintiff was thereby hindered and prevented from, and lost the season for cultivating the same, as he otherwise might and would have done, but also divers great quantities of grass and hay, to wit, one thousand tons of hay and one hundred acres of grass there then lying of great value, to wit, of the value of five thousand dollars, were wholly washed away, consumed and destroyed, and the plaintiff hath been and is thereby otherwise greatly injured.

And whereas, also, the said plaintiff, before and at the time of the committing of the grievances hereinafter next mentioned, was and from thence hitherto hath been, and still is lawfully possessed of certain other lands, divers, to wit, six hundred and forty acres of land, with the appurtenances, situate in the county of Fond du Lac, in said district, and known and described as section one, (1,) in township number fifteen (15) north, of range seventeen (17) east, in and upon which said lands, during all the time aforesaid, there was accustomed, and, except for the committing of the grievances hereinafter mentioned, natu-
8 rally would, and of right ought to, grow great quantities of grass and herbage, to wit, of great value, to wit, of the value of five thousand dollars per year, and of which said premises the said defendant hath always had notice, to wit, in the district aforesaid. Yet the

said defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the said plaintiff, and to deprive him of the use, benefit, and enjoyment of the said lands and the grass and herbage growing, and accustomed to grow, and that, except for the committing of the said grievances, would have grown thereon, kept and contrived and caused to be kept and contrived, a certain dam or obstruction before them, wrongfully made, erected, built, and placed in, upon, and across the north channel of Fox River or outlet of Lake Winnebago, on the north side of an island at the foot of said lake, commonly called and known as Doty Island, in the county of Winnebago, in said district, near to the lands so possessed by the said plaintiff, for a long space of time, to wit, hitherto. By means of which said premises the waters of the said Lake Winnebago wrongfully, and with great force and violence overflowed the lands so possessed by the said plaintiff as aforesaid, and staid and continued in and upon the same for a long space of time, to wit, from that time hitherto, and during that time washed up and subverted divers, to wit, five hundred trees, and destroyed the grass and herbage growing on said lands of the plaintiff there then growing and being, and filled up, choked, and
9 destroyed the ditches and drains of the plaintiff on his said lands, and greatly saturated said lands with water so as aforesaid flowing thereon, and otherwise much lessened the same in value, and the plaintiff was thereby hindered and prevented from cultivating and improving the said lands as he otherwise might and would have done, and the plaintiff hath been and is thereby otherwise greatly injured.

And whereas, also, the said plaintiff, long before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been and still is, lawfully seized & possessed of a certain other piece or parcel of land with the appurtenances, situate and being in the county of Fond du Lac aforesaid, and in the said district of Wisconsin, particularly known & described as section one, town fifteen, range seventeen, containing six hundred and forty acres, which said lands, except for the committing of the grievances next hereinafter mentioned, were and would have been of great value, for the purposes of pasturage, cultivation, and tillage, of which said premises the said defendant hath always had notice, to wit, in the county and district aforesaid. Yet the said defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the said plaintiff and to deprive him of the use, benefit, and enjoyment of the said lands and premises, with the appurtenances, and to annoy and incommode him in the use, possession, and enjoyment of the said
10 last-mentioned lands and premises, with the appurtenances, heretofore, to wit, on the 1st day of August, A. D. 1861, and at divers other days and times aforesaid and before the commencement of this suit, kept and contrived and caused to be kept and contrived, in the county of Winnebago, in said district, a certain dam or obstruction in, upon, over, and across the north channel of the Fox River, or outlet of Lake Winnebago, on the north side of an island at the foot of said lake, commonly called and known as Doty Island; before then, wrongfully made, erected, and built, near to the lands of said plaintiff, for a long space of time, to wit, hitherto, by means whereof the waters of the said Lake Winnebago were wrongfully forced and thrown back upon and overflowed the said lands of the said plaintiff last aforesaid mentioned, and staid and continued in and upon the said lands for a long space of time, to wit, from that time hitherto, and during that time washed away and destroyed one hundred acres, parcel of the said last-mentioned lands of

the plaintiff, and washed up, subverted, and destroyed, divers, to wit, five hundred trees, and destroyed and consumed the grass and herbage growing upon divers, to wit, one hundred acres, parcel of the remainder of the said last-mentioned lands of the said plaintiff, of great value, to wit, of the value of two thousand dollars; and filled up, choked, and destroyed the ditches and drains of the plaintiff on his said lands last hereinafter mentioned, and greatly saturated said lands with
11 water so as aforesaid flowing thereon, and otherwise much lessened the same in value, and the plaintiff thereby hath been and still is greatly annoyed, hindered, and prevented from tilling, cultivating, using, and improving the said last-mentioned lands as he otherwise might and would have done; and the plaintiff hath been, and is thereby otherwise greatly injured, to wit: at the district aforesaid.

To the damage of the plaintiff of thirty thousand dollars, and therefore he brings suit.

J. M. GILLET,
Att'y for Pl'ff.

Rule to plead.

And same day, (December 2, 1867,) "on motion of J. M. Gillet, plaintiff's attorney, ordered that the defendant plead to the plaintiff's declaration on file by the first Monday of January next, or its default will be entered."

FEBRUARY 15, 1868.—This day came the defendant by its attorney, Mr. Stevens, and filed its demurrer, as follows:

Demurrer.

United States circuit court for the district of Wisconsin, of the second Monday of September, 1867.

GREEN BAY & MISSISSIPPI CANAL COMPANY, } *ads.* GEORGE J. PUMPELLY. }

12 And the said defendant, the Green Bay and Mississippi Canal Company, by Breese J. Stevens, its attorney, comes and defends the wrong and injury, when, &c., and says that the said first, and said second, & said third counts of the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff, George J. Pumpelly, to have or maintain his aforesaid action thereof against the said defendant, and the said defendant is not bound by law to answer the same, and this he is ready to verify. Wherefore, by reason of the insufficiency of the said first and said second counts of the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, &c.

BREESE J. STEVENS,
Attorney for Defendant.

I certify that, in my opinion, the foregoing demurrers are well founded in law.

H. L. PALMER,
Of Counsel for Def'ts.

MARCH 2, 1868.—This day came the plaintiff, by his attorney, and filed his joinder in demurrer, as follows:

Joinder in demurrer.

United States circuit court, district of Wisconsin, of the second Monday of September, 1867.

13 GEORGE J. PUMPELLY
vs.
GREEN BAY & MISSISSIPPI CANAL COMPANY.

And here comes the said plaintiff, by his said attorney, and saith that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof, against the said defendant, and the said plaintiff is ready to verify & prove the same as the court here shall direct & award; wherefore, inasmuch as the said defendant has not answered the said declaration, nor hitherto, in any manner, denied the same, the said plaintiff prays judgment & his damages for the said several wrongs in the said declaration mentioned.

J. M. GILLET,
Att'y for Pl'ff.

APRIL 21, 1868.—This day came the parties, by their counsel, and the demurrer to the declaration came on to be heard, and was submitted by Mr. Gillet for plaintiff, and by Mr. Palmer for the defendant, when the court held the same under advisement.

Order overruling demurrer.

JUNE 3, 1868.—This day came the parties, by their counsel,
14 and on consideration of the demurrer to the plaintiff's declaration, it is ordered by the court that the said demurrer be, and hereby is, overruled, and that the defendant plead to said declaration by the first Monday of July next.

JULY 9, 1868.—This day came the defendant's counsel, and, on his motion, it is ordered by the court that the time for filing pleas be extended until the twentieth day of July, instant.

AUGUST 1, 1868.—This day came the defendant, by its attorneys, Messrs. Stevens & Flower, and filed its pleas, as follows:

Pleas.

United States circuit court, district of Wisconsin, of the second Monday of September, A. D. 1867.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, sued by the name of The Green Bay and Mississippi Canal Company,
ads.
GEORGE J. PUMPELLY.

And the defendant in this suit, Green Bay and Mississippi Canal

Company, against whom the said plaintiff, George J. Pumpelly, hath filed his said writ and declaration by the name of The Green Bay and Mississippi Canal Company, by Stevens & Flower, its attorneys, comes and defends the force and injury, when, &c., and says, that the said defendant is not guilty of the said supposed grievances above laid
15 to its charge, in manner and form as the said plaintiff hath above thereof complained against him, &c., and of this it, the said defendant, puts itself upon the country.

And the said plaintiff doth the like, &c.

And for a further plea in this behalf, the said defendant, Green Bay and Mississippi Canal Company, against whom the said plaintiff, George J. Pumpelly, hath filed his said writ and declaration, by the name of The Green Bay and Mississippi Canal Company, by leave of the court first had and obtained, according to the statute in such case made and provided, by Stevens & Flower, its attorneys, comes and says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, the said defendant, because it, the said defendant, says:

That by an act of the council and house of representatives of the then Territory of Wisconsin, at a session thereof holden in Madison, in said Territory (now State) of Wisconsin, on or about the tenth day of March, A. D. 1848, and then and there possessing all the powers of legislation of said Territory, and full powers to do, enact, and perform, as hereinafter stated, the said council and house of representatives, to wit, the legislature of the then Territory of Wisconsin, passed an act entitled "An act to authorize the construction of a dam across the north branch of Fox River," which said act was duly approved by the governor
16 of said Territory on the 10th day of March, A. D. 1848, and which said act is in the words and figures following, to wit:

"*Be it enacted by the Council and House of Representatives of the Territory of Wisconsin:*

"SECTION 1. That Curtis Reed and his associates be, and they are hereby, authorized to construct a dam across the north channel or outlet of Winnebago Lake, at such point as they may deem suitable, on the fractions of section twenty-two, in township twenty north, of range seventeen east, and to make use of the waters of said river for hydraulic purposes.

"SEC. 2. Said dam shall not exceed seven feet in height above high water mark of said river: *Provided*, That said dam shall not raise the water in Lake Winnebago above its ordinary level; and the said Curtis Reed and his associates, their heirs, and assigns, shall be subject to, and entitled to, all the benefits and provisions of the act relating to mills and mill dams, approved January 13, 1840.

"SEC. 3. That so much of the act to authorize the construction of a dam across the Fox River, approved February 8, 1847, as authorizes the persons therein named to build a dam across said channel, be, and the same is hereby, repealed."

That under and by virtue of said act of the legislature of the then Territory of Wisconsin, the said Reed and one —— Doty, his
17 associate for that purpose duly chosen, thereupon undertook and begun the building and erection of the dam thereby authorized, and at the place in the said act and in the said declaration mentioned, and which said dam, when completed, became, was, and is the same dam mentioned and described in the plaintiff's declaration aforesaid and in each count thereof.

That subsequently thereto, and after the admission of Wisconsin into

the Union as a State, and after the acceptance by the said State of the grant of land made by Congress to aid in the improvement of the Fox and Wisconsin rivers, to wit, on or about the eight day of August, in the year of our Lord, 1848, aforesaid, the legislature of the then State of Wisconsin, at a session thereof holden at Madison, in the State of Wisconsin, passed an act entitled "An act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal," which was approved on the 8th day of August, A. D. 1848, to which said act and the several acts amendatory thereof reference is here made.

That thereupon, under and pursuant to the provisions of the act last aforesaid, a board of public works was duly organized, consisting of five persons, who were each duly elected and qualified, and who undertook the execution of the duties and trusts thereby devolving upon them.

That thereupon, in the execution of their said duties and trusts, the said board of public works entered into and made a contract with
18 the said Reed and his said associate Doty, whereby, for a good and valuable consideration therein expressed, including the sole and exclusive right to the water-powers thereby created, they, the said Reed and Doty, agreed, among other things, to finish and complete the building and erection of the said dam theretofore as aforesaid undertaken and begun by them, the said Reed and Doty, which said dam, so to be completed, should belong to and be the property of the State, to be thereafter maintained and kept in repair by the said Reed and Doty, and their assigns, of the water-power thereby created, and by which said contract they did, among other things, for the consideration aforesaid, assign and transfer to said State, subject to their right to the water-power aforesaid, the said dam and all of their right, title, and interest in and to the same, and all rights, interests, and privileges acquired and to be acquired by them, under and by virtue of the act of the legislature of the Territory of Wisconsin aforesaid, and of the acceptance of the same by them, and of their expenditures of labor, materials and money thereunder.

That thereupon, under and pursuant to the said contract and the acts of the legislature of the Territory and State of Wisconsin aforesaid, the said Reed and said Doty did continue the making, erection, and building of the said dam, and did fully finish and complete the same, in or prior to the year A. D. 1852, which dam, when so completed, was
19 built to a height no greater than that authorized by the said act approved March 10th, 1848.

That all of the conditions and provisions of the said several acts aforesaid, relating to or in any way affecting the said dam, were fully complied with, and the said Reed and said Doty, under the said several acts and said contract, were fully authorized to make, build, and complete the same in manner and form, in all respects as the same was built.

That the said dam has ever since been, and is now, maintained at the same height and in the same manner and to no greater height and in no different manner than that to which and in which it was originally built as aforesaid, and the same is the only dam which now is or ever has been built upon the said north channel of the Fox River or outlet of Lake Winnebago, and is the same dam mentioned in the plaintiff's said declaration.

That about the same time a certain other dam was by other parties built across the south channel of said Fox River, on the south side of

the island, in the said declaration named, and is now and ever since then has been there maintained; that by means of the said two dams the waters of said river & of Lake Winnebago were set back & made to overflow the premises described in the several counts of the said plaintiff's declaration at the times therein mentioned, and there
20 to effect upon the lands & other property the damages therein set forth; which are the same supposed trespasses whereof the said plaintiff hath in his said declaration & the several counts thereof complained against the said defendant.

That under and by virtue of an act of the legislature of the State of Wisconsin entitled "An act to incorporate an association for the completion of the improvement of the Fox and Wisconsin rivers," approved July 6th, 1853, to which act and the acts amendatory thereof reference is here made, the "Fox and Wisconsin Improvement Company" became and was duly organized, and all of the conditions and provisions necessary thereto in the said act contained were fully complied with and performed.

That under and by the act last aforesaid the said company was required to construct, repair, and maintain the said dam, and under and by the said act the State of Wisconsin granted and conveyed to the said Fox and Wisconsin Improvement Company, with other property, rights, franchises, and privileges, the dam aforesaid and the privilege of constructing and repairing the same, and all other rights and privileges belonging to the improvement, (including the said dam,) to the same extent and in the same manner that the State then held or might exercise such rights by virtue of the aforesaid act, approved Au-
21 gust 8th, 1848, and of the several acts supplemental thereto and amendatory thereof, subject to certain provisos or conditions named in the said act, approved July 6th, 1853.

That each and all of the said provisos or conditions, and each and every other condition contained in the said act, approved July 6th, 1853, and the acts amendatory thereof, on the part of the said Fox and Wisconsin Improvement Company, to be kept and performed, were duly and fully kept and performed, and the property, rights, franchises, and privileges described in said acts became thereby vested in the said company.

That under and by virtue of an act of the legislature of Wisconsin entitled "An act to facilitate the sale of the lands and other property of the Fox and Wisconsin Improvement Company, to provide for the proper application of the proceeds of such sale, and to authorize the formation of a corporation by the purchasers," approved April 13th, 1861, and the acts amendatory thereof, to each and all of which reference is here made, the defendant, the "Green Bay and Mississippi Canal Company," became, in or about the fifteenth day of August, A. D. 1866, and ever since has been, and now is, a corporation existing under and by the laws of this State.

That each and all of the conditions necessary thereto, required by the acts last aforesaid, are duly and fully performed.

That subsequently thereto, to wit, on or about the sixteenth
22 day of August, A. D. 1866, the said defendant received a conveyance of, and thereby became seized of, the said dam and of the privilege of constructing and repairing the same, and all other rights and privileges belonging to the improvement, (including the said dam,) which the said Fox and Wisconsin Improvement Company at any time held or acquired therein as aforesaid.

That the said dam was constructed, contrived, erected, and built, and

has been kept, maintained, and repaired as aforesaid, and since the date last aforesaid, under and by authority from this defendant.

That the defendant has so done as it lawfully might do, and this the defendant is ready to verify; wherefore it, the defendant, prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof, against it, the defendant.

And for a further plea in this behalf, the said defendant, Green Bay and Mississippi Canal Company, against whom the said plaintiff, George J. Pumpelly, hath filed his said writ and declaration, by the name of the Green Bay and Mississippi Canal Company, by leave of the court first had and obtained, according to the statute in such case made and provided, by Stevens & Flower, its attorneys, comes and says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, the said defendant, because it, the said defendant, says, that
23 the said several supposed causes of action in the said declaration mentioned did not, nor did any or either of them, accrue at any time within ten years next before the commencement of this suit, in manner and form as the said plaintiff hath above thereof complained against it, the said defendant, and this, it, the said defendant, is ready to verify. Wherefore it, the defendant, prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, the said defendant.

And for a further plea in this behalf, the said defendant, Green Bay and Mississippi Canal Company, against whom the said plaintiff, George J. Pumpelly, hath filed his said writ and declaration by the name of the Green Bay and Mississippi Canal Company, by leave of the court first had and obtained, according to the statute in such case made and provided, by Stevens & Flower, its attorneys, comes and says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, the said defendant, because it, the said defendant, says:

That by an act of the council and house of representatives of the then Territory of Wisconsin, at a session thereof holden in Madison, in said Territory (now State) of Wisconsin, on or about the tenth day of March, A. D. 1848, and then and there possessing all the powers of legislation of said Territory, and full powers to do, enact and perform, as hereinafter stated, the said council and representatives, to wit, the legis-
24 lature of the then Territory of Wisconsin, passed an act entitled "An act to authorize the construction of a dam across the north branch of Fox River," which said act was duly approved by the governor of said Territory on the tenth day of March, A. D. 1848, and which said act is in the words and figures following, to wit:

"*Be it enacted by the council and house of representatives of the Territory of Wisconsin:*

"SECTION 1. That Curtiss Reed and his associates be, and they are hereby, authorized to construct a dam across the north channel or outlet of Winnebago Lake, at such point as they may deem suitable, on the fractions of section twenty-two, in township twenty north, of range seventeen east, and to make use of the waters of said river for hydraulic purposes.

"SECTION 2. Said dam shall not exceed seven feet in height above high-water mark of said river: *Provided*, That said dam shall not raise the water in Lake Winnebago above its ordinary level; and the said Curtiss Reed and his associates, their heirs and assigns, shall be subject to, and entitled to, all the benefit and provisions of the act relating to mills and mill-dams, approved January 13, 1840.

"SECTION 3. That so much of the act to authorize the construction of a dam across the Fox River, approved February 8, 1847, as authorizes the persons therein named to build a dam across said channel, be, and the same is hereby, repealed."

25 That subsequently thereto and after the admission of Wisconsin into the Union as a State, and after the acceptance by the said State of the grant of land made by Congress to aid in the improvement of the Fox and Wisconsin Rivers, to wit, on or about the eighth day of August, in the year of our Lord 1848, aforesaid, the legislature of the then State of Wisconsin, at a session thereof holden at Madison, in the State of Wisconsin, passed an act entitled "An act to provide for the improvement of the Fox and Wisconsin rivers and connecting the same by canal," which was approved on the 8th day of August, A. D. 1848, to which said act and the several acts amendatory thereof, reference is here made.

That the said Curtiss Reed and his associate, duly chosen for that purpose, to wit, one Doty, forthwith accepted the provisions and duly performed each and all of the conditions on the part of the said Reed and his associates to be performed in the said first-mentioned act contained, and became seized of the powers, rights, and privileges by the said act granted and conferred.

That under and by virtue of the act of the legislature of the State of Wisconsin, approved August 8th, A. D. 1848, aforesaid, a board of public works was duly organized consisting of five persons, who were each duly elected and qualified, and who undertook the execution of the duties and trusts by the act last aforesaid devolved upon them.

That each & all of the provisions and conditions contained
26 in the said act approved August 8th, 1848, and the acts amendatory thereof necessary to enable, authorize, and empower the said board of public works to do and perform each and all of the matters and things by them done as hereinafter stated, were fully and duly complied with, kept, and performed, and thereby the said board of public works became, and were at the times of doing the same, duly authorized, enabled, and empowered to do and perform as hereinafter stated.

That thereupon the said Reed and his said associate, Doty, under and by virtue of the provisions of the said act of the legislature of the Territory of Wisconsin, approved on the tenth day of March, 1848, undertook and begun the building, construction, and erection, of the dam in the said act and in the said plaintiff's declaration mentioned.

That thereafter and before the completion of the same, under and by virtue of a certain agreement or contract by them then made with the said board of public works, and the powers thereby conferred, and under and by virtue of the provisions contained in the said act of the legislature of the Territory of Wisconsin, approved March 10th, 1848, and of the provisions contained in the said act of the legislature of Wisconsin, approved August 8th, 1848, for themselves and the said board of public works, they, the said Reed and his said associate, Doty, continued, carried on, finished and completed the building, construction, and erection of the said dam mentioned as aforesaid.

27 That the said dam so undertaken, commenced, constructed, and completed was commenced in or about the year A. D. 1848, and completed in or about the year A. D. 1852; and the said dam so completed was built to the same height and in the same manner, and to no greater heighth and in no different manner from that duly authorized under & according to the provisions aforesaid, and to no greater

heighth than was authorized by the act aforesaid, approved March 10th, 1848.

That the said dam has ever since been and is now continued and maintained at the same and no greater heighth, and in the same and no different manner from that to which and in which it was originally built and erected as aforesaid.

That the same is the only dam now existing, or at the times aforesaid, or at any time ever built upon the said north channel of the Fox River, or outlet of Lake Winnebago, and is the same dam mentioned in said declaration & the several counts thereof.

That under and by virtue of the provisions of an act of the legislature of Wisconsin approved April 13, A. D. 1861, and the acts amendatory thereof, to each and all of which reference is here made, the defendant, the Green Bay and Mississippi Canal Company, became on or about the fifteenth day of August, A. D. 1866, and ever since has been, and now is, a corporation existing under and by the laws of this State.

That each and all of the conditions necessary thereto, required
28 by the acts last aforesaid, were duly and fully performed; that subsequently thereto, to wit, on or about the sixteenth day of August, A. D. 1866, the said defendant, for a good, valuable consideration, duly paid, received conveyances of, and thereby became legally seized and possessed of, the "Fox and Wisconsin Rivers Improvement," so called, together with all and singular the rights of way, dams, locks, canals, water powers, and other appurtenances of the said works; also all other rights, privileges, franchises, easements, and appurtenances of all kinds mentioned and described in the acts of the legislature of Wisconsin in relation thereto, approved respectively July 6th, 1853, and October 3d, 1856, and the acts amendatory thereof to which reference is here made, and including the said dam and the privilege of constructing and repairing the same, subject only to the right of the said Reed and Doty, & their heirs or assigns, to the waterpower thereby created, and including all other rights, privileges and easements, growing out of or connected with the said improvement which the said State, or the said board of public works, or the said Reed and Doty at any time held or acquired therein as aforesaid, and including the easement or right to overflow, &c., hereinafter mentioned.

That in & by the acts aforesaid the said defendant & the Fox & Wisconsin Improvement Company were required to build, erect, construct, repair, and maintain the said dam.

That, since the making of the conveyances last aforesaid the said defendant has continued and remained and still continues and re-
29 mains seized and possessed of and entitled of right to all and singular the works of improvement, rights, privileges, franchises, easements, &c., acquired as aforesaid, including the said dam and the easement or right to overflow, &c., hereinafter mentioned.

That in and by the act of building and completing the dam aforesaid, and the act of building and completing by other parties of a certain other dam across the south channel of said Fox River, and by means of the waters of said Lake Winnebago, the said Reed and Doty, and the said State by its board of public works did, as they lawfully might do, seize, and to the extent necessary and for the purposes of a water power and of said improvement, take possession of all and singular the lands and premises, trees, grass, hay, herbage, drains, and ditches mentioned in the said declaration to the extent that the same were, as therein alleged, destroyed, damaged, overflowed, saturated, and subverted and otherwise injured, and ever since the completion of said dam, to wit,

in or about the year A. D. 1852, they and this defendant and the intermediate grantees of said works of improvement, property, rights, privileges, franchises, easements, &c., have respectively held, and this defendant does now hold, continuous, uninterrupted and exclusive possession of the same.

That the said seizure and taking of possession were so made and done under claim and color of right and title duly made by virtue of the laws of Wisconsin aforesaid, and were so made and done publicly and
30 notoriously and with the knowledge and acquiescence of the said plaintiff, and under the like claim and color, and in like manner, knowledge, and acquiescence, the possession thereof has ever since been and is now maintained as aforesaid.

That at the time of the said seizure and taking of possession the said plaintiff was seized in fee and in the possession of, and ever since has remained seized in fee and in the possession of, all and singular the lands and premises mentioned in the said declaration and upon and from which the said seizure and taking of possession were done and made, subject only to the rights acquired by the said seizure and taking of possession.

That during all of said time the said plaintiff was not under any legal disability whereby he was disabled from bringing suit because thereof.

That the defendant has so done as it lawfully might do.

And this the defendant is ready to verify.

Wherefore it, the defendant, prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, the defendant.

And for a further plea in this behalf the said defendant, Green Bay and Mississippi Canal Company, against whom the said plaintiff, George J. Pumpelly, hath filed his said writ and declaration by the name of The Green Bay and Mississippi Canal Company, by leave of the court first had and obtained, according to the statute in such case made and provided, by Stevens & Flower, its attorneys, comes
31 and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, the defendant, because it, the said defendant, says:

That the said dam mentioned in the said plaintiff's declaration ever since it was constructed and erected as hereinafter stated has been and is a mill dam; that the said dam was fully constructed, erected, and completed prior to April 3d, 1862, to wit, in or about or prior to the year A. D. eighteen hundred and fifty-two, and more than ten years prior to the commencement of the plaintiff's said action; that the said supposed grievances mentioned in the said plaintiff's declaration and the several counts thereof, and therein laid to the defendant's charge, were and are, in manner and form, as the said plaintiff hath above thereof complained against it, the said defendant, each and all occasioned by the flowing of the lands and premises mentioned in the said declaration and the several counts thereof, by reason of the construction or erection of the dam aforesaid, which said flowing has continued more than ten years next preceding the commencement of said action.

And this it, the said defendant, is ready to verify. Wherefore it, the defendant, prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, the said defendant.

And for a further plea in this behalf the said defendant, Green Bay and Mississippi Canal Company, against whom the said plaintiff,
32 George J. Pumpelly, hath filed his said writ and declaration by

the name of The Green Bay and Mississippi Canal Company, by leave of the court first had and obtained, according to the statute in such cases made and provided, by Stevens & Flower, its attorneys, comes and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against it, the defendant, because it, the said defendant, says:

That under and by the provisions of an ordinance of the confederate Congress for the government of the territory of the United States northwest of the river Ohio, adopted July 14th, 1787; and the provisions of an act of Congress relating thereto, passed August 7th, 1789, after the adoption of the Constitution of the United States; and the provisions of an act of Congress establishing the territorial government of Wisconsin, approved April 20th, A. D. 1836; and the provisions of an act of Congress relating to the admission of the State of Wisconsin into the Union, approved August 6th, 1846; and by the provisions of the constitution of the State of Wisconsin, and under and by the laws of the United States and of the State of Wisconsin, it is declared and provided in substance that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free, &c.

That the Fox and Wisconsin Rivers and Lake Winnebago in the State of Wisconsin are and ever have been navigable waters, and
33 of the navigable waters in the aforesaid ordinance, acts, constitution and laws referred to.

That the said Wisconsin River is a navigable water leading into the Mississippi, and the said Fox River is a navigable water leading, with & through other navigable waters, into the St. Lawrence, and the carrying place between the same is of those and the one especially referred to in the ordinance, &c., aforesaid.

That by an act of Congress entitled "An act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin Rivers, and to connect the same by a canal in the Territory of Wisconsin," approved August 8th, 1846, a grant of land was made to the State of Wisconsin to aid in the improvement of the Fox and Wisconsin Rivers and the carrying place between the same, the provisions of which grant the said State was authorized to accept, and did accept, and which grant the said State undertook to apply to the purposes for which it was given, by and through its board of public works, duly organized for that purpose; and, by and through its legislature, the said State did enact numerous laws in relation thereto, to each and all of which and of the doings of said State in relation thereto reference is made. And the more important of which are the following, to wit: an act entitled "An act to provide for the improvement of the Fox & Wisconsin Rivers, and connecting the same by a canal," approved August 8th, 1848; an
34 act entitled "An act to incorporate an association for the completion of the improvement of the Fox & Wisconsin Rivers," approved July 6th, 1853; an act entitled "An act to facilitate the sale of the lands and other property of the Fox & Wisconsin Improvement Company, to provide for the proper application of the proceeds of such sale, & to authorize the formation of a corporation by the purchasers," approved April 13th, 1861, and the acts amendatory of each of the same.

That the improvement of said rivers, to wit, the "Works of the Fox and Wisconsin Rivers Improvement" were undertaken, begun, and carried on by the said State, by and through its said board of public works.

That thereupon the same were transferred and granted to the Fox

and Wisconsin Improvement Company, in manner & form, to the exte[nt] and upon the conditions, and subject to the provisions expressed and contained in the act of the legislature of Wisconsin incorporating the said company, and the acts supplemental thereto, and amendatory thereof.

That each & all of the said conditions and provisions were complied with.

That the said works of the Fox and Wisconsin Rivers Improvement were by said company continued, carried on, and for the most part completed.

That under and by virtue of the laws of Wisconsin, and especially of an act of the legislature of Wisconsin entitled "An act to facilitate the sale of the lands and other property of the Fox and Wisconsin Im-
35 provement Company, to provide for the proper application of the proceeds of such sale, and to authorize the formation of a corporation by the purchasers," approved April 13th, 1861, and the acts amendatory thereof, this defendant, on or about the fifteenth day of August, A. D. 1866, became, and ever since has been, and now is, a corporation existing under the laws of Wisconsin.

That subsequently thereto, to wit, on or about the sixteenth day of August, A. D. 1866, by conveyances duly & lawfully made under and pursuant to each and all of the provisions of law relating thereto or affecting the same, & for a good and valuable consideration duly paid, the said defendant became, and ever since has been, and now is, seized and possessed of the said works of improvement, & of all right, title, and interest therein at any time held or acquired by said Fox and Wisconsin Improvement Company, or said State, including the easements or right and privileges hereinafter mentioned.

That since the time last aforesaid, this defendant has been engaged in completing and maintaining the said works of improvement.

That under the authority given by the said board of public works and the laws of Wisconsin, and the United States aforesaid, the dam mentioned in the said plaintiff's declaration, and the several counts thereof, was undertaken, built, completed, maintained, and continued.

That the said dam, in the manner and form in which it was
36 built, contrived, erected, completed, maintained, and continued, to wit, as mentioned in the said declaration, was, and ever since it was so built has been, and now is, an essential, necessary, and integral part or portion of the said works of improvement, and necessary to the proper improvement of the navigability of said Fox and Wisconsin Rivers, and to the proper development and enlargement of their capacity as common navigable highways.

That in and by the ordinance, acts of Congress, and laws hereinbefore referred to, the United States reserved for the purposes aforesaid, and with the said works of improvement subsequently granted, assigned, and transferred to the said State (under which this defendant claims and holds) the easement, or right and privilege of overflowing, damaging, destroying, saturating, subverting, and otherwise injuring the lands and premises, trees, grass, hay, herbage, drains, and ditches mentioned in the said declaration, to the extent and in the manner therein mentioned, and to the extent necessary in order to improve the navigability of the Fox and Wisconsin Rivers.

That under the treaty with the Winnebago Indians of September 15, 1832, the United States agreed to patent to Theresa Pacquette one section of land, to be designated under the direction of the President of the United States.

That the lands & premises mentioned in the said plaintiff's declaration, on the 18th day of January, 1836, were so designated for the said Theresa, and on or about the eighteenth day of May, A. D. 1849,
37 the said plaintiff's grantor, to wit, the said Theresa Placquette, first obtained a patent from the United States of the said lands and premises.

That the said grantor so purchased the same with full notice at the time of, and subject to, the said easement, or right aforesaid therein and thereupon reserved, and prior thereto granted to the said State for the purposes aforesaid.

That each and all of the subsequent grantees of said lands and premises, including the said plaintiff, purchased the said premises with full notice at the time of, and subject to, the same easement, &c.

That because of the matters aforesaid, the defendant hath so as aforesaid done, and as charged in the said declaration, as it lawfully might do.

And this the defendant is ready to verify. Wherefore it, the defendant, prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against it, the defendant.

STEVENS & FLOWER,
Attorneys for Defendant.

MADISON, *Wisconsin:*

I certify that, in my opinion, the foregoing special pleas are well founded.

H. L. PALMER,
Of Counsel for Def't.

AUG. 1, 1868.

NOVEMBER 2, 1868.—This day came the plaintiff, by his attorney, & filed his replication & demurrers, as follows:

38 *Replication to 3rd plea.*

United States circuit court, district of Wisconsin.

GEORGE J. PUMPELLY
vs.
GREEN BAY & MISSISSIPPI CANAL COMPANY.

And the said plaintiff, as to the said plea of the said defendant by it thirdly above pleaded, saith that the said plaintiff, by reason of anything by the said defendant in said plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against the said defendant, because he saith that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said plaintiff within ten years next before the commencement of this suit, in manner & form as the said plaintiff hath above complained against the said defendant, to wit, at the county of Fond du Lac, in the district of Wisconsin aforesaid.

And this the said plaintiff prays may be inquired of by the country, &c.

J. M. GILLET,
Pl'ff's Att'y.

Demurrer to the 2d, 4th, & 6th pleas.

United States circuit court, district of Wisconsin.

GEORGE J. PUMPELLY
vs.
GREEN BAY AND MISSISSIPPI CANAL COMPANY.

And the said plaintiff, as to the pleas of the said defendant by
39 it secondly, fourthly, and sixthly above pleaded, saith that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same.

And this he, the said plaintiff, is ready to verify. Wherefore, by reason of the insufficiency of the said pleas in this behalf, the plaintiff prays judgment and his damages by him sustained on occasion of the committing of the said grievances, to be adjudged to him, &c.

J. M. GILLET,
Att'y for Pl'ff.

I certify that, in my opinion, the foregoing demurrer is well founded in law.

J. M. GILLET,
Of Counsel for Pl'ff.

Demurrer to 5th plea.

United States circuit court, district of Wisconsin.

GEORGE J. PUMPELLY
vs.
GREEN BAY & MISSISSIPPI CANAL COMPANY.

And the said plaintiff, as to the said plea of the said defendant by it fifthly above pleaded, saith that the same & the matters therein contained, in the manner & form as the same are above pleaded and
40 set forth are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, & that he, the said plaintiff, is not bound by law to answer the same.

And this he, the said plaintiff, is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and his damages by him sustained on occasion of the committing of the said grievances, to be adjudged to him, &c.

J. M. GILLET,
Att'y for Pl'ff.

I certify that, in my opinion, the foregoing demurrer is well founded in law.

J. M. GILLET,
Of Counsel for Pl'ff.

JULY 6, 1869.—This day came the defendant, by its attorneys, and filed its joinders and rejoinder, as follows:

Rejoinder.

United States circuit court, district of Wisconsin, of the second Monday of September, A. D. 1867.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, sued by the name of The Green Bay and Mississippi Canal Company,
ads.
GEORGE J. PUMPELLY.

And the said defendant, Green Bay and Mississippi Canal Company, against whom the said plaintiff, George J. Pumpelly, hath filed his said writ and declaration by the name of the Green Bay and Mississippi Canal Company, as to the said replication of the said plaintiff to the plea of the said defendant thirdly above pleaded, and
41 whereof he hath put himself upon the country, doth the like.

STEVENS & FLOWER,
Att'ys for Def't.

H. L. PALMER,
Of Counsel.

Joinder in demurrer to 2nd, 4th, & 6th pleas.

United States circuit court, district of Wisconsin, of the second Monday of September, A. D. 1867.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, sued by the name of The Green Bay and Mississippi Canal Company,
ads.
GEORGE J. PUMPELLY.

And the said defendant saith that its said pleas by it secondly, fourthly, and sixthly above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action thereof against it, the said defendant; and the said defendant is ready to verify and prove the same, when and where, and in such manner as the said court here shall direct and award.

Wherefore, inasmuch as the said plaintiff hath not answered the said pleas secondly, fourthly, and sixthly above pleaded, nor hitherto in any manner denied the same, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining
42 his aforesaid action thereof against it, the said defendant, &c.

STEVENS & FLOWER,
Att'ys for Def't.

H. L. PALMER, Esq.,
Of Counsel.

Joinder in demurrer to 5th plea.

United States circuit court, district of Wisconsin, of the second Monday in September, A. D. 1867.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, sued by the name of The Green Bay and Mississippi Canal Company,
ads.
GEORGE J. PUMPELLY.

And the said defendant saith that its said plea by it fifthly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining his aforesaid action against it, the said defendant; and the said defendant is ready to verify and prove the same, when and where and in such manner as the said court shall direct and award.

Wherefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against it, the said defendant, &c.

STEVENS & FLOWER,
Att'ys for Def't

H. L. PALMER,
Of Counsel.

43 JULY 7, 1869.—This day came the parties by their counsel, and the demurrers to pleas of defendant were argued.

And afterwards, to wit, at a stated term of said court, begun and held according to law at the city of Madison, on the first Monday of January, 1870, and on the fourth day thereof, to wit, on the 6th day of January, A. D. 1870—present the Hon. Andrew G. Miller, district judge, presiding—the following proceedings were had, to wit:

Order of court on demurrers to pleas.

GEORGE J. PUMPELLY
vs.
GREEN BAY AND MISSISSIPPI CANAL COMPANY.

This day came the parties by their counsel, and the demurrers to the second, fourth, fifth, and sixth pleas of defendant being argued, it is ordered by the court that defendant's counsel have leave to withdraw the fifth plea, with leave to file another plea of limitations instead thereof. And it is further ordered that the demurrers to the said second, fourth, and sixth pleas be, and hereby are, overruled. And it is further ordered that the defendant's counsel have leave to withdraw the third plea, with leave to file another plea in lieu thereof.

And now, at this same term, to wit: April Term, A. D. 1870, and on the twenty-second day thereof, to wit, on the fifth day of May,
44 A. D. 1870, the following proceedings were had, to wit:

Judgment.

GEORGE J. PUMPELLY
vs.
GREEN BAY & MISSISSIPPI CANAL COMPANY. } At law.

This day came the parties by their counsel. The defendants' counsel withdrew their plea of not guilty, and also the third and fifth pleas. And the demurrer of the plaintiff to defendants' second, fourth, and sixth pleas being overruled, it is considered and adjudged by this court now here that the plaintiff take nothing by his writ, and that the defendant do have and recover of the said plaintiff, George J. Pumpelly, twenty dollars and seventy-five cents, its costs about its said defense in this behalf by it expended, and that it have execution therefor.

Judgment roll signed May 5, 1870.

EDWARD KURTZ, *Clerk.*

Costs $20 75.
Judgment roll filed May 5th, A. D. 1870, at five o'clock p. m.
EDWARD KURTZ, *Clerk.*

MAY 6, 1870.—This day came the plaintiff and filed his bond, with James M. Gillet as surety, in the penalty of five hundred dollars, conditioned that the said plaintiff shall prosecute a writ of error to
45 effect, and answer all costs if he shall fail to make good his plea, which bond is approved by the district judge, and is as follows:

Bond for costs on writ of error.

Circuit court of the United States for the district of Wisconsin.

GEORGE J. PUMPELLY
vs.
GREEN BAY & MISSISSIPPI CANAL COMPANY. }

Know all men by these presents that we, George J. Pumpelly and James M. Gillet, are held and firmly bound unto the Green Bay & Mississippi Canal Company, defendant above named, its successors and assigns, in the penal sum of five hundred dollars, to which payment well and truly to be made we bind ourselves, our heirs, executors, & administrators firmly by these presents. Sealed with our seals & dated this 5th day of May, A. D. 1870.

Whereas the above-named George J. Pumpelly has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the above-named George J. Pumpelly shall prosecute his writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

46 GEORGE J. PUMPELLY, [SEAL.]
By J. M. GILLET, *his Att'y.*
JAMES M. GILLET. [SEAL.]

May 5, 1870. Approved.

A. G. MILLER, *District Judge.*

47 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, Edward Kurtz, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record & proceedings in the suit of George J. Pumpelly vs. Green Bay & Mississippi Canal Co.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district of Wisconsin, this seventh day of June, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fourth.

[SEAL.] EDWARD KURTZ, *Clerk.*

48 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America, for the district of Wisconsin, before you, between George J. Pumpelly, plaintiff, and Green Bay & Mississippi Canal Company, defendant, a manifest error hath happened, to the great damage of the said George J. Pumpelly, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth.

EDWARD KURTZ,
Clerk U. S. Circuit Court, Dist. of Wis.

Filed May 6, 1870.

EDW. KURTZ, *Clerk.*

49 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The United States of America to Green Bay & Mississippi Canal Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the district of Wisconsin, wherein George J. Pumpelly is plaintiff in error and

you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy, and of the independence the United States the 94th.

A. G. MILLER,
District Judge.

We admit service of above citation this 4th day of June, A. D. 1870.
STEVENS & FLOWERS,
Att'ys for G. B. & M. C. Co.

Filed June 6, 1870.

(Indorsement on cover:) No. 458. George J. Pumpelly, plaintiff in error, vs. The Green Bay and Mississippi Canal Company. Wisconsin C. C. U. S.
Filed 11th June, 1870.

SUPREME COURT
OF THE UNITED STATES.

DECEMBER TERM, 1871.

GEORGE J. PUMPELLY,
Plaintiff in Error,

vs.

GREEN BAY AND MISSISSIPPI CANAL COMPANY,
Defendant in Error.

No. 37.

POINTS AND ARGUMENT OF PLAINTIFF IN ERROR.

J. M. GILLET, Att'y for Pl'ff in Error.
DAVID TAYLOR, of Counsel.

Supreme Court of the United States.

DECEMBER TERM, 1870.

GEORGE J. PUMPELLY, Plaintiff in Error,

vs.

GREEN BAY AND MISSISSIPPI CANAL COMPANY, Defendant in Error.

No. 226.

POINTS AND ARGUMENT OF PLAINTIFF IN ERROR.

This is an action to recover damages for flowing the plaintiff's land, situate at the head of Lake Winnebago, in the State of Wisconsin, by means of a dam across the north branch or channel of the outlet of the lake. The outlet is divided by Doty island, near the foot of the lake, thus forming two channels. The dam in the north channel is now owned and maintained by the defendant, and is the alleged cause of the injury complained of.

The declaration contains three counts, the first of which alleges that the plaintiff, before and at the time of the alleged trespass, was the owner of section 1, township 15, range 17, bounding on Lake Winnebago; and that the defendant built, or caused to be built, the dam in question, by means of which the waters of the north channel of the outlet of the lake and of the lake were caused to flow back upon said land, whereby the trees and herbage growing upon the land were destroyed, the ditches and drains thereon filled up, a large quantity of hay then being on the land, and one hundred acres of the soil washed away, &c.

The second count charges the destruction of the trees, grass, and herbage, the filling up of the ditches and drains,

the depreciation of the land by soakage and loss of cultivation.

The third count is for continuing the dam theretofore erected, and charging like injuries.

To this declaration the defendant interposes, first, the general issue, which is withdrawn; also two separate pleas, the 3d and 5th, of separate statutes of limitation, to which the plaintiff demurred, and the court below sustained the demurrer, and these pleas were also withdrawn.

There remains upon the record three separate pleas—the 2d, 4th, and 6th—to which the plaintiff demurred; and, these demurrers being overruled by the court below, judgment final was entered thereon against the plaintiff, and from this judgment the plaintiff brings a writ of error.

The defendant's second plea sets forth an act of the Legislature of the Territory of Wisconsin, approved March 10, 1848. This act authorizes Curtis Reed and his associates to build a dam across the north channel or outlet of Lake Winnebago, and make use of the waters of said river for hydraulic purposes. *Section* 2 of the act limited the height of the dam to not exceeding seven feet above high-water mark, with a proviso *that said dam* shall not raise the water in Lake Winnebago above its ordinary level; and provides that Reed and his associates, &c., shall be subject to and entitled to all the benefits and provisions of the act relating to mills and mill-dams, approved January 13, 1840.

The plea then alleges that said Reed and Doty, his associate, began the building of said dam under said act, and that afterwards, on the 8th day of August, 1848, an act was passed by the Legislature of the State of Wisconsin, approved on that day, entitled "An act to provide for the improvement of the Fox and Wisconsin rivers, and connecting the same by a canal." That under the provisions of said act a board of public works was duly organized, who undertook the execution of the duties and trust conferred upon them by said act. That this board, by agreement with said Reed and his associate, Doty, acquired the right to said dam, and that the same was completed in the year

1852, and was not built higher than seven feet above high-water mark, as limited by said act of March, 1848. That the dam has always been maintained at the same height, and is the same dam complained of by the plaintiff.

The plea then further alleges that, by an act of the Legislature of the State of Wisconsin, approved July 6, 1853, the "Fox and Wisconsin Improvement Company" was duly organized, upon which the legislature conferred the power to improve said river, and granted said company the dam aforesaid, with other property, privileges, and franchises, and that under an act of the Legislature of said State, approved April 13, 1861, and the acts amendatory thereof, the "Green Bay and Mississippi Canal Company" became, on or about the 16th day of August, 1866, and ever since has been and now is, a corporation; and that, as such corporation, the said defendant, on the 16th day of August, 1866, became seized of the said dam, and all other rights and privileges belonging to said Fox and Wisconsin Improvement Company, and that said dam has since that time been kept, maintained, and repaired by this defendant.

I.

If this plea be construed to mean simply that the defendant has succeeded, by the acts of the Legislature of the State of Wisconsin of August 8, 1858, of July 6, 1853, and April 13, 1861, and the acts amendatory thereof, and by agreement between the board of public works and the said Reed and Doty, to the rights and powers conferred upon said Reed and his associates by the act of the Territorial Legislature of March 10, 1848, then the plea is bad, for the reason that it admits, by not denying, that the dam built by the said Reed and Doty, and which the defendant now claims to own and hold by purchase from them, is and was so built as to raise the water of Lake Winnebago above its ordinary level, which is the very act complained of by the plaintiff.

If it is said by counsel for the defendant that the proviso in the act of March 10, 1848, is void, as repugnant to the grant of the right to raise a dam seven feet high above ordinary high-water mark, and as repugnant to and destructive of the whole object sought by the grant, we reply, this does not appear from the plea itself, and the defendant cannot sustain his plea by alleging matters that are not set forth therein.

It may be, from aught that appears from the record, that a dam can be erected and maintained across the north channel or outlet of Lake Winnebago, at the place indicated in the act of March 10, 1848, of the height of seven feet above high-water mark, which will not raise the waters of Lake Winnebago above its ordinary level.

Again, it does not appear from the plea that a dam of less than seven feet high above high-water mark across said outlet would not be sufficient to create the hydraulic power at that place intended to be granted by the legislature.

The plea does not, therefore, show or even suggest that the proviso in the act, conferring the right upon said Reed and his associates to build said dam, is in the least repugnant to, or destructive of, the objects sought by that act.

That part of said act of March 10, 1848, which declares that said Reed and his associates, their heirs and assigns, shall be subjected to and entitled to all the benefits and provisions of the act relating to mills and mill-dams, approved June 13, 1840, does not, by implication or otherwise, enlarge their powers as to the height to which they may raise their dam, but subjects them to the disabilities and confers upon them the benefits of said act while in the exercise of the powers conferred upon them by the act under which they claim the right to build and maintain the dam. It cannot be maintained that a party to whom a privilege is granted by the legislature, when in the exercise of rights granted by the same act, can claim the benefits of such privileges when acting in violation of those

rights, and for the protection of which such privileges were also granted.

The defendant therefore, claiming under Reed and his associates, cannot claim the privilege of the mill-dam act to protect them in the maintenance of a dam which was built in violation of the terms of the act of March 10, 1848.

Again, under ch. 56, R. S. 1858, copied from the laws laws of 1840, and which is the act relating to mills and mill-dams, and the same act referred to in the act of March 18, 1848, no person is entitled to any of the privileges of that act, except a person who erects a dam for the purpose of raising water to propel a water-mill owned by himself.

The language is: "Any person may erect and maintain a *water-mill and* a dam to raise water for working it upon," &c.

It is quite clear that, under this law, it is only the person who erects and maintains the water-mill who is authorized to build and maintain the dam.

A person, therefore, who builds a dam across a stream, solely for the purpose of creating hydraulic power to let to others who may desire to use the same to propel their mills, cannot claim the privileges of this act.

The whole spirit and object of the law favors this interpretation. The State of Wisconsin adopted the law of the State of Massachusetts on this subject; and the construction given to the law by the courts of that State, previous to its adoption by this State, governs its construction here.

The construction of the law, as above stated, was well settled in Massachusetts long before its adoption here.

Slack *v.* Lyon, 9 Pick., 62.
Stowell *v.* Flagg, 11 Mass., 364.
Fitch *v.* Stevens, 4 Metc., 426.
Large *v.* Orvis, 20 Wis., 696.
Hill *v.* Sayles, 12 Metc., 148.
Boston and R. Dam Corp. *v.* Newman, 12 Pick., 477.
Murdock *v.* Stickney, 8 Cush., 117.

It cannot well be insisted that, under the act of March 8,

1848, Reed and his associates acquired any greater rights than they were to have had under the mill-dam act, had they erected their dam across a non-navigable stream. The only object of the act was, to legalize the construction of their dam across a navigable stream, and to place them, in regard to said dam, in the same condition as they would have been had the mill-dam act applied to dams on navigable streams as well as others.

The law was not intended to take away the common-law rights secured to parties injured by the building and maintenance of that dam, except so far as the same rights were taken away from parties injured by the acts of another under the mill-dam law; and, so long as the said Reed and his associates could show that they kept the dam for the purpose of running a water-mill or mills, erected and maintained by them, they can claim the privileges of said chapter 56, and no longer.

Wood *v.* Hustis, 17 Wis., 416.
Crosby *v.* Smith, 19 Wis., 449.
Hill *v.* Sayres, 12 Metc., 148.
Fitch *v.* Stevens, 4 Metc., 426.

Again, the plaintiffs claim that the only mills protected by the statute of 1840, ch., 56, R. S. 1858, are grist and custom-mills.

The doubtful power of the legislature to authorize mill-owners to take the property of other citizens for the use of their mills against their consent can only be sustained on the ground that these mills are, in a just sense, industries, in the maintenance of which the public have an interest of such paramount importance as to justify the exercise of the power of eminent domain.

It is true that in Massachusetts the courts have held the law constitutional as to all mills driven by water, whether custom, grist, or saw-mills, or mills for other manufacturing purposes. In this State the courts, at an early day,

questioned the power of the legislature to confer this power upon private persons owning mills, and its right so to do was affirmed by a divided court, and that in a case involving the rights of a grist-mill owner.

Newcomb *v.* Smith, 1 Chand., 71.
Pratt *v.* Brown, 3 Wis., 603.
Thein *v.* Voegtlander, 3 Wis., 461.
Fisher *v.* Horicon Iron and Man. Co., 10 Wis., 351.
Newell *v.* Smith, 15 Wis., 101.

In 10 Wis., 353, the court uses this language:

"The only ground upon which the taking can be justified is, that mills are a great public convenience—almost a necessity—and that every person or corporation which avails itself of the franchise given by the act *must take it with the resultant duty of operating the mill for the public or any individual.*"

In this case the court says that, if it were an open question, the decision in 1 Chand., 79, could not be sustained. And it is only adhered to on the ground of *stare decisis*, and with the limitations therein indicated. In 15 Wis., 101, the same doctrine is reiterated.

If the operation of the mill-dam act is to be limited to those mill-owners who operate their mills for the public generally, then it can apply only to those who, by the law of the land, are obliged to do work for the public, such as grist and custom-mills, and, possibly, certain saw-mills and custom woolen-mills.

Our courts have not adopted the Massachusetts doctrine upon this subject.

See 11 Mass., 365, note on page 368.

In Massachusetts the court upholds the law, upon the grounds that the public have such an interest in the development of the great natural advantages of the water-power in the rivers and streams of the country as will justify the legislature in taking private property, against the will of

the owners, for the purpose of utilizing these natural powers for the public good.

B. & R. Mill-dam Corporation *v.* Newman, 12 Pick., 467.

Murdock *v.* Stickney, 8 Cush,, 116, 117.

Again, the plaintiff claims that this plea is bad, if it be attempted to be sustained on the ground that the defendant is the successor of Reed and his associates, and has the right to maintain the dam under the act of March 10, 1848, for the reason, that the plea sets forth the act of August 8, 1848, as well as the act of July 6, 1853. And the act of April 13, 1861, which is made a part of the plea, and then claims that the rights of the defendant were acquired by a transfer from the State of Wisconsin to it of all the rights, powers, privileges, and franchises conferred upon the Fox and Wisconsin Improvement Company.

By an examination of the act of August 8, 1848, it will be seen that the State of Wisconsin undertook to execute a trust, which was conferred upon it by the act of Congress of August 8, A. D. 1846, and by the act of Congress of August 6, 1846, admitting the State of Wisconsin into the Union. That, in order to execute such trust, the legislature established a board of public works, and conferred upon such board certain powers, to enable them to execute the same. Section 15 of said act of August 8, 1848, authorized said board of public works, when necessary for the construction of the improvements authorized and contemplated by said act, to enter upon and seize any lands, water, and materials, the appropriation of which for the use of such works of improvement should in their judgment be necessary. This act only authorizes the board to take land, water, &c., for the purpose of making the improvements in navigation; and there is no authority given to seize or take property for the purpose of creating a water-power or for manufacturing purposes.

The plea alleges that this board of public works purchased the dam built by the said Reed and his associates,

and made the same a part of the property of the State and a part of the improvement. The dam itself is primarily a part of the improvement of the navigation of the river, and the State and its grantees hold it only in that capacity; and under the act of July 6, 1853, the said grantees of the State are bound to keep this dam in repair, as well as all other parts of the improvement, and they can claim no right to maintain this *dam*, except as a part of the works necessary to improve the navigation of said river; and they have no rights or privileges in respect of said dam, except such as they have in respect to any other dam on said improvement. None of the laws above referred to confer upon the defendant, as the grantee of the State, or otherwise, any power to keep or maintain any dam, except as the same shall be necessary for the improvement of the navigation of the river. They may utilize all the water-power created by the works of improvement, but have no right to go beyond that, and create or maintain water-power for mere manufacturing or milling purposes.

Reed and his associates having surrendered to the State their right to maintain a dam, under their charter, for mere hydraulic purposes, and having consented that the same should become a part of the improvement of the navigation of the river, can only claim such rights as the board of public works, under the law, were authorized to exercise. They and their assigns hold only the right to such water-power as is or may thereafter be created by the maintenance of the works necessary to improve the river navigation. All rights which Reed and his associates acquired under the grant of March 10, 1848, were surrendered when they surrendered the dam to the State, by agreement with the board of public works. And now, neither Reed and his associates, or their assigns as grantees of the State, can claim any rights under the charter of March 10, 1848.

The plea alleges that, under the act of 1853, the "Fox and Wisconsin Improvement Company," under their charter, and as successors of the board of public works, were

required to construct, repair, and maintain said dam, and that the same was granted to said company by the State, by virtue of said act, with the other property constructed by the board of public works; and it is further alleged, that said company was to own, hold, construct, repair, and maintain the same, to the same extent, and in the same manner, that the State held and had the right to do under the act of August 8, 1848.

The defendant in this action sets up no claim except that which was conferred upon the improvement company, and holds, therefore, in the same manner, and with the same rights, that said company held, and no other.

Again: This plea is defective in not alleging that the lands of the plaintiff were appropriated or condemned, and compensation made therefor.

II.

The fourth plea sets forth the several acts set forth in the third plea, showing the grant of power to Reed and his associates; the formation of the board of public works; alleges a contract between the board of public works and the said Reed and Doty. It is alleged that said Reed and Doty built the dam for themselves and the said board of public works. It then alleges the formation of the "Fox and Wisconsin Improvement Company," under the acts of 1853 and October 3, 1856, and acts amendatory thereof, and the transfer to said company of all the works of said improvement, including the dam in question; that in 1866 the defendant became possessed of all the rights and property of the "Fox and Wisconsin Improvement Company," including this dam; and claims that since that date the defendant has continued and remained, and still continues and remains, seized and possessed of and entitled of right

to all and singular the works of improvement, including said dam. It claims the easement or right to overflow the lands of the plaintiff, and then claims that, by virtue of building the dam complained of, *and by the building of another dam by other parties*, and by means of the waters of Lake Winnebago, *the said Reed and Doty* and the said State, by its board of public works, did, as they lawfully might, seize and, to the extent necessary, and for the purpose of a water-power and of said improvement, take possession of the plaintiff's premises, &c., and claims to have held the same, since the year 1852, down to the time of the commencement of this action.

This plea does not show a prescription to flow the lands of the plaintiff, for the reason that twenty years had not elapsed from the time of the alleged seisin and flowing and the commencement of this action; and it can only be sustained on the ground that the original seisin and overflow was a lawful act, as alleged in the plea.

This plea undertakes to combine two claims of right, and then alleges that, *by virtue of the two* combined, the act is lawful.

Either the act is lawful, by reason of the claim of right under the act of March 10, 1848, or it is unlawful under that act.

In answer to the second plea, it has been shown that there can be no lawful claim to flow plaintiff's land under the act; and we think it has been shown pretty conclusively, that neither the improvement company, this defendant, nor the said Reed and his associates, can now claim any rights under that act. The rights of said Reed and his associates, having been surrendered to the State board of public works, are merged in the rights of the State board under the act of August 8, 1848, and the rights and powers of the State board were transferred to the defendant in this action; and this defendant now has no other rights or powers, in respect to this dam, than those held by the said board.

Under the act of August 8, 1848, did the board of public works acquire any right to flood the lands of this plaintiff?

If anything can be well settled in the State of Wisconsin, either by the constitutional provisions, the laws of the State, or the judicial decisions of the supreme court thereof, the proposition that "private property shall not be taken for public use, without just compensation therefor," is well settled.

The plea admits that the land flooded was the property of the plaintiff.

Does the act of August 8, 1848, authorize the board of public works to flood the lands of the plaintiff, or of any other person, for the purpose of making the improvements contemplated by the act? It does not in express terms. And, if it does by implication, then it is unconstitutional, for not having provided any method or means for compensating the parties injured by the overflow. The only provisions in said act authorizing the board of public works to take the property of private persons for making the improvement is found in section 15, which reads as follows:

"In the construction of such improvements the said board shall have power to enter on, to take possession of, and use all lands, waters, and materials, the appropriation of which for the use of such works of improvement shall, in their judgment, be necessary."

Section 17, which provides for making compensation, limits the compensation to be made for the following purposes only: "Where lands, waters, or material, appropriated by the board to the use of the public in the construction of the said improvements, shall not be freely given," &c. Then the section provides for the appointment of appraisers to fix the compensation to be made.

Are the words "lands, waters, and material," apt words to describe the injury occasioned by the flooding of lands by means of dams erected for the construction of the improvement? Had the Legislature contemplated the flood-

ing of large tracts of land as necessary to the completion of their works of improvement, most certainly it would have provided for compensating the owners of the same.

If these words do not include damages for flooding lands, then the law of August 8, 1848, provides no means for making compensation for injuries of that kind, and the party injured has his common-law remedy for the injury inflicted.

This plea is bad, admitting that the defendant had power, under the act of August 8, 1848, to flood these lands, for the reason that the act only authorizes its grantors, the board of public works, to take such lands, waters, and materials as shall, in their judgment, be necessary for the use of such improvement.

The plea alleges that *Reed and his associates, and the State, by its board of public works*, "did, as they lawfully might, seize, and to the extent necessary, and *for the purposes of a water-power*, and of said improvement," &c. Now, it has been, we think, pretty conclusively shown that, under the law conferring the right to take lands, &c , by the board of public works, for the improvement of the Fox and Wisconsin rivers, there was no power conferred to take for the purposes of a water-power.

The said board of public works could take what, in their judgment, was necessary to make the works of improvement. And if thereby a water-power was created, the board had the right to have the same. The water-powers over which the board could have control were only such as were incidental to the work of the improvement.

The creation of water-powers was no part of the trust conferred on the State by the acts of Congress above referred to, nor was it any part of the duty conferred on the board of public works by the State; and the defendant claims under, and stands in the place of, the said board, and has no further or other powers than such as were conferred on said board.

The plea alleges that the board, conjointly with Reed and his associates, took what was necessary for a water-

power and the improvement. It does not appear from the plea that the taking for the improvement alone has caused any damage to the plaintiff's land.

It may very well be, that the taking for a water-power and improvement caused the damage; and yet be true that the taking what was necessary for the improvement caused no damage.

The act of July 6, 1853, provides that the locks and improvements shall be so made as to pass boats drawing but two feet of water; and it is easy to understand how this might be done without raising a dam seven feet above high-water mark.

The defendant, in justifying so grave an injury to private rights as the destruction of several hundred acres of valuable land, must not leave his right in doubt. No intendment will be made in his favor; and if upon his statement any doubt exists as to his legal right, the plea must be held bad.

Again: Admitting that the flooding of the plaintiff's land is a taking within the meaning of said act, and that the board of public works could have had his damages appraised under said act, and that such right and power were transferred to the defendant in as ample a manner as they were given to said board, (which, however, is not admitted by the plaintiff,) it is still insisted that the plea is bad.

The defendant, as now organized, is as much a private corporation as any railroad, canal, or bridge company. It has the right to receive tolls, and do other acts for the benefit of the stockholders of the company; and, whilst they are improving a public highway, they do it, not for the public good, but for the private gain of the stockholders; and they must stand or fall by the same rules that govern other corporations.

The plaintiff insists that the Legislature of the State of Wisconsin has no power to confer upon a corporation organized to construct a public highway, which is to be

managed and controlled by the corporators for their own benefit, the right to *permanently appropriate private property without first making* just compensation therefor; and if any such corporation attempts to do so, it becomes a trespasser, and may be proceeded against as such.

Robbins *v.* R. R. Co., 6 Wis., 636.
Shepardson *v.* R. R. Co., 6 Wis., 603.
Powers *v.* Bears, 12 Wis., 213.
Davis *v.* La. and M. R. R. Co., 12 Wis., 16.
Pettibone *v.* R. R. Co., 14 Wis., 443.
Ford *v.* C. and N. W. R. R. Co., 14 Wis., 609.
Loop *v.* Chamberlain, 17 Wis., 504.
Loop *v.* Chamberlain, 20 Wis., 135.
Carpenter *v.* O. and S. R. R. Co., 24 N. Y., 655.
Mayer *v.* Troy Union R. R. Co., 25 N. Y., 526.
Stacey *v.* Vt. Cent. R. R. Co., 27 Vt., 39.
Cushman *v.* Smith, 34 Me., 247.

If the defendant in this action is clothed with all the rights conferred upon the board of public works, that law having provided no mode by which the owner can compel the appraisement of damages or the payment of compensation, it is in that respect repugnant to the constitution of the State of Wisconsin, and void.

Norton *v.* Peck, 3 Wis., 714.
Shepardson *v.* R. R. Co., 6 Wis., 605.
Powers *v.* Bears, 12 Wis., 213.
Pratt *v.* Brown, 3 Wis., 603.

The defendant in this action derives all his powers from the laws of the State of Wisconsin, and these powers are therefore to be determined by the construction given to them by the highest court of that State.

It may be urged by the counsel for the defendant that the plaintiff should proceed by a writ of mandamus, to compel the defendant to appoint appraisers, as provided in the act organizing the board of public works.

If the power to appoint appraisers was transferred to the

defendant by the laws of Wisconsin above referred to, it is the duty of the defendant to take the initiative; and, under all the decisions above referred to, it cannot now set up its own neglect as a defense to an action of trespass.

But the supreme court of the State of Wisconsin, in the case of *v.* , (6 Wis., 603,) has expressly decided that, in a case like this in all respects, the landowner was not compelled to resort to the writ of mandamus, but might bring his action of trespass.

III.

Were the sixth plea not seriously interposed, it would seem the height of absurdity to invoke the aid of the ordinance of 1787 to justify so great a wrong as the destruction of private property without compensation. Does the declaration in the ordinance referred to in said plea, and in the constitution of the State of Wisconsin, "that the rivers and lakes shall always remain common highways, and forever free to all the people of the United States, without any tax, impost, or duty therefor," in any way pledge Congress, or the State, to improve the navigation of these waters? Is it not rather a declaration that they shall remain as nature made them? This certainly is the natural import of the language. And it was only after much discussion and litigation that the courts, yielding to the necessity for greater facilities in the manner of transportation than these rivers in their natural state furnished, finally decided that they might be improved by artificial means.

If the logic of this plea is correct with reference to these streams, then the Government of the United States or of the State of Wisconsin, after having disposed by sale of the lands bordering on these streams, and after large cities had been built on the same, might without compensation sweep them all away, with dams built to improve the navigation. If they can with impunity take an acre, they may

take ten thousand acres. If they may take the log cabin of the pioneer, they may take the palaces of the great cities.

The ordinance of 1787, and all the other laws referred to, instead of conferring, in fact, any rights upon the State, is a restriction of its sovereignty over these rivers and waters, and nothing more. All the duty it imposes upon the State is the negative one of letting these natural highways alone, free to such primitive means of navigation as in their natural state they afforded: and it may well be argued that this kind of navigation was the only kind contemplated by the authors of the ordinance.

It was not until the authors of this ordinance had passed away, and the great changes wrought in the methods of navigation, by the successful application of steam to the propulsion of boats and ships, had been accomplished, that either Congress or the State of Wisconsin undertook, by the improvement of these rivers and waters, to supplant the bark canoe and flat-boat of the cotemporaries of the authors of the ordinance of 1787 by the modern steamboat.

In the interest of commerce, and for the general good, this innovation upon the restraints of the ordinance was tolerated.

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The argument of the defendant in support of this plea takes the broad ground, that the public may in the improvement of the navigation of a public river, in its discretion, take such private property lying along the banks of such river, as in its judgment it may consider necessary to accomplish that purpose without making any compensation to the owner therefor. To us this argument seems to come into direct conflict with that provision in both the constitution of the United States and the State of Wisconsin, which declares, that the property of no person shall be taken for public use without just compensation therefor."

It cannot be answered that the flooding of the private lands of an individual by reason of raising the waters of a public stream so that the same overflow its banks and flood the same permanently is not a taking for public use within the meaning of the constitutional prohibition. We insist that such an occupation by flooding is as much a taking within the prohibitory clause as though the land itself was taken for the purpose of making locks, canals or dams necessary for convenient construction of the works of improvement

Angell on water courses §465, says :

"It is not necessary that the land should be absolutely tak-
"en, but any serious interruption to its common and necessa-
"ry use is equivalent to the taking of it : so that if a corpora-
"tion is created by the legislature, for the purpose of con-
"structing and maintaining a canal, if no compensation is
"made or provided for a discharge of the water from the can-
"al, upon the lands of others, they are entittled in an action
"on the case to recover damages for an injury sustained by
"such discharge."

See Hooker vs. New Haven and Northampton Co. 14 Conn. R 146.

Chancellor Walworth in the case of the Canal Appraisers vs. The People 17 Wend. 604 thus defines what constitutes a *taking for* public use "What the counsel for the relator have "contended for in this case is that whenever it is necessary to "take the property of an individual or to destroy *or material-* "*ly injure him in regard to its present or future use for the public* "*good*, he is entittled to compensation for the damages he may "really sustain thereby. This is the fair and reasonable con- "struction of the constitutional provision on this subject."

The Supreme Court of the State of Wisconsin in Newcomb vs. Smith 1 Chandler 71 seem to take it as granted that the flooding of lands by reason of erecting mill dams is a *taking* of private property within the meaning of the prohibitory clause in the constitution of the State of Wisconsin. It is true the court in that case were not discussing the constitutional prohibition, but the prohibition contained in the Ordinance of 1787, which was not materially different from the provision in the Constitution. Without raising any question upon the point as to whether the act of flooding lands by the erection of mill dams, was a *taking thereof* the court proceeds as though that point were conceded and then justifies the taking on the ground that it was for a public use and therefore allowable on making compensation.

Again the same court in Pratt vs Brown 3 Wis 613. uses the following language. "The fundamental principle upon "which the constitutionality of the mill dam act is sustained, "is essentially similar, however different may be its mode "of accomplishing the desired result. The theory is *that the* "*property of the person whose land is overflowed is taken* for the "public use, through the exercise of the right of Eminent Do- "main vested in the goverment. Upon no other theory or prin- "ciple can the law be upheld for a moment."

The same court in the case of Fisher vs. Horicon Iron and Man. Co. 10 Wis. 353 say :

"It does appear to us to be going a great length to say that

land which is used for the purpose of flowage by a mill dam is appropriated to a "public use" in the proper and just sense of those words; nor does the law seem to provide the constitutional compensation for the LAND THUS TAKEN and appropriated which it should."

The same court in the case of Newell vs Smith et al 15 Wis. 104, in giving a construction to an act of the Legislature which authorized a mill dam owner to flood lands for the purpose of raising the water in the same, says:—"We do not "know upon what principle of law, reason or justice, such an "enactment of the Legislature under the constitution of this "State can be sustained. Within repeated decisions of this "court, it is clearly unconstitutional and void. It professes to "authorize the respondents to *overflow, use, enjoy* and practic- "ally destroy the value of the lands of an individual, with ut "first making compensation therefor."

See also Walker vs. Shepardson 4 Wis 511, 512.

We confidently submit that the cases above cited clearly establish the point that the permanent flooding of lands, is a taking of the same within the prohibitory clause of the constitution of the State of Wisconsin.—And that especially the decisions of the Supreme Court of the State of Wisconsin have conclusively settled that question so far as relates to the constitution of that state. If judicial decisions can settle any constitutional question then the cases above cited in the Supreme Court of Wisconsin have settled the question that the flooding of lands of private persons permanently, by any public or private corporation is a taking thereof within the meaning of the prohibitory clause of the constitution of that State. To us it seems a waste of time if not a reflection upon the intelligence of this court to pursue this question further. Were it not for the fact that the learned counsel on the opposite side have gravely and persistently urged that there is a distinction between the actual appropriation of a spade full of soil "and the destruction of thousands of acres of valuable lands by the pouring over them the waters of a navigable stream and that in the first case the soil, the value of which is infinitely small,

may not be appropriated by the State without just compensation and in the second case the lands the value of which are infinitely great as compared with the other may be destroyed with impunity—we would have concluded that the mere statement of the case would be a sufficient argument against its soundness and our only doubt now as to the utter absurdity of the proposition arises from the fact that the very eminent counsel on the opposite side, seem to have convinced themselves that the proposition is sound and sustained by the decisions of many of the most learned courts of this country.

In answer to this argument it is insisted by the defendant that there are a long line of decisions that hold a contrary doctrine and from which it is inferred either that the same rule does not apply to the public when improving the navigation of its public streams or highways, or else that the permanent flooding of the land of private individuals by reason of such public works of improvements is not a taking for public use.

After a careful examination of all the cases cited by the defendant to which we have had access, we are unable to concur in the conclusion arrived at by the defendants counsel.

We respectfully submit that the only points settled by the great array of cases cited by the defendant are these:

FIRST. That the public in the construction of works for the improvement of the navigation of public rivers are not liable to private individuals for any consequential damages which the individual may suffer by reason of the construction of such works of improvement, either by the deepening of the waters in the public stream, the changing of the current of the stream, increasing or slackening their rapidity, or by diverting either in whole or in part the waters of such stream from its accustomed channel.

We have not been able to find in all the cases referred to, one which holds the doctrine that the public may with impunity stop the current of a public stream, and throw its waters outside of its banks upon private property.

Take the case of Canal Appraisers vs. The People in the

17 Wend. 571, which is one of the cases decided in the Court of Errors in New York, and upon which the defendant places great stress. This was a case in which a private individual owning lands on one side of the Mohawk river near where it emptied into the Hudson, had applied for a writ of mandamus to compel the canal appraisers to appraise damages which he claimed to have suffered by reason of the raising in the waters of said stream and thereby destroying a valuable water power he claimed to own therein.

The question in this case which was discussed and upon which all the wealth and learning of the eminent lawyers and judges was expended was whether the claimant or the State owned the bed of the stream and consequently the water flowing over the same at the point where the water power was located, for the destruction of which damages was claimed.

Senator Beardsley on page 605 states the question very briefly, thus:

"The case has been argued on more enlarged grounds and "before proceeding to consider the important questions that "have been urged by counsel, it may be proper to remark "that the question submitted is one of mere right between the "parties. It is not a question whether as a matter of expe "diency or justice, the state will remunerate the relator "which might be a very proper subject for legislation, but "whether he or the State owns that part of the *bed of the* [illegible]

After thus stating the case he goes on to show that the Mohawk was a public river, that the title to the bed thereof was in the State and not in the claimant, and that the claimant therefor as riparian owner had no title to the natural waterfall in the stream at that place and therefore no claim for damages on account of its destruction.

The case is in none of its features like the case at bar, where it is admitted that the title to the land flooded was in the plaintiff and not in the State.

The learned judges who decided that case against the claimant clearly admit that if the title to the property injured had

been in the claimant he would have been entitled to compensation. Senator Beardsley on the same page above referred to makes the following remarks which show his views upon the question presented in the case at bar:

"Now upon the principles assumed by the Supreme Court "the sprout from the Hudson to the fall was an arm of the sea "and navigable (the tide ebbing and flowing) and to that extent "belonged to the public and yet judgment for damages has "been given as well for this part as that further up the stream "and above the flow of the tide. It is very obvious therefore "that if this part of the sprout is to be regarded as navigable "from the flux and reflux of the tide, that the judgment is "erroneous and might be reversed on this ground as giving to "the defendant damages for a greater interest than he is enti-"tled to .

Senator Tracy, who also gave a very learned opinion against the claimant in that case, closes his argument as follows, page 636. "In the present case the right of the State to use the *element at the place where the dam was built* was absolute and unqualified and if the use of it there was rightful, I cannot think that the State is liable for damages, which an individual having a subordinate right to the water at another place, may have sustained in consequence of its changed condition adjacent to his land. I repeat there appears to be a *manifest distinction* between the right of the public in such a case to affect within its natural channel, the water adjacent the lands of individuals, AND THE RIGHT TO OVERFLOW THESE LANDS BY CARRYING THE WATER OUT OF ITS NATURAL CHANNEL.

Again on page 629 the same Senator uses this language — "If the relator has the same title and rights to the water "flowing by his island as he has to the island itself, he doubt-"less has the same claim to be indemnified against whatever-"injuriously affects the one or the other. But I cannot con-"ceive the nature of his property in the two to be alike, or "that the right of the public to elevate the water WITHIN its "natural channel is not different from the right to elavate it

"ABOVE its natural channel and thereby make *it overflow and* "*affect injuriously the property of individuals to which the pub-* "*lic has no pretension or claim for any purpose whatever.*"

Chancellor Walworth who delivers the dissenting opinion in the case differs *only with the majority* of the court *in holding that the bed of the stream* at the place in question was the private property of the claimant and that therefore he was entitled to have his damages for the injury sustained.

In closing his argument he says : "In the case under con- "sideration the power of the State to improve any of its wa- "ters so as to render them navigable, or to improve the navi- "gation of those which could before be navigated to a certain "extent, is not denied by the relator, and indeed could not "be: as the right to take private property for any public use, "which the legislature in the exercise of a sound discretion "may deem expedient and necessary for the general good, is "expressly recognized in the constitution itself. What the "counsel for the relator have contended for in this case is that "wherever it is necessary to take the property of an indivi- "dual or to destroy or materially injure him in regard to its "present or future use for the public good, he is entitled to "compensation for the damages he may really sustain there- "by. This is the fair and reasonable construction of the con- "stitutional provision on this subject, &c."

With this conclusion the majority of the court in no way dissent.

It will be found that the constitutional provision of the constitution of the State of New York was and is the same as is the constitution of the State of Wisconsin.

The case of the people vs. The canal commissioners 33 N. Y. 461, was another case against the canal commissioners to compel them to assess damages which the relator Loomis claimed he had sustained as riparian owner and the owner of a grist mill at Little Falls on the Mohawk River, which for a long time previous to 1841 had been propelled by the waters of the Mohawk. The ground of claim was that in 1841 the state diverted a large portion of the waters of the Mohawk

above the mill of the claimant to feed the canal and that by reason of such diversion the claimant could not operate his mill as profitably as he could previous thereto.

This case was decided in the Court of Appeals against the claimant on the sole ground that the Mohawk river at the place mentioned was a public navigable river that the title to the bed of the stream was in the State and not in the claimant and therefore the State might divert the waters thereof to any public use it saw fit without compensating the riparian owner.

The cases cited from the Pennsylvania courts are all decided upon the same principle, that the waters and bed of the navigable streams belong to the public, and that no private individual can acquire any right to the use of those public waters which is not subserviant to the public use, and which use may not be destroyed whenever the public may require the use of such waters for any other public purpose. None of them treat of the right of the public to flood the lands of riparian owners, but only of such rights as the riparian owners claimed in the use of the waters of the stream flowing past their lands.

There are another class of cases referred to by the defendant, of which the cases of Hollister vs. the Union Company in the 9 Conn. 436; and Alexander vs. the City of Milwaukee in the 16 Wis. 247 are leading and strong cases; these cases as well as others of a like nature referred to by the defendant are decided adversely to the claimants rights-- upon the ground that the acts complained of were lawful in themselves and that the resultant injury was not *the direct and immediate consequence* of the acts of the agents of the State, but merely consequential and remote, and therefore not a taking of private property for public use within the prohibitory clause of the constitution.

In the case of Alexander vs. the City of Milwaukee. Judge Cole in delivering the opinion of the court uses this language.

"Thus it will be seen the case presents the simple question "whether the Appellant can recover for such CONSEQUENTIAL

"DAMAGES thus resulting to this property from the city mak-"ing the harbor improvement, a work it was especially authoriz-"ed to do, and done without any negligence and in a proper "manner.—It appears to us that the weight of authority is de-"cidedley against the position that the action is maintainable.

"It can hardly be claimed that under the facts of the com-"plaint *there was a taking by the city of the Appellant's prop-"erty for public use within this constitutional meaning of that "language.*

"If there were such a taking of property then it is very ob-"vious that the city must make just compensation for the "property appropriated. In saying this we would not wish "to be understood as asserting the doctrine that there must "be an actual taking or appropriation of the property itself "in order to entitle the owner to compensation for damage "done him * * * * * * "The city did not take the property but made a great public improve-"ment in the vicinity, which incidentally produced the injury complained of."

The court in deciding this case recognizes the liability of the state or municipalities to make compensation in all cases where private property is taken for public use, but put the decisions upon the ground that the facts alleged in the com plaint did not show a *taking* but damage resulting to the plain tiff's land by reason of the action of the winds and waves. The acts of the city did not necessarily cause the waters of the river or of the Lake to flow over the plaintiff's land or cause it to be washed away; it simply removed a natural barrier which lay between the Lake and plaintiff's land, and by reason of such removal, and by the action of the winds on the waters of the Lakes when blowing in a certain direction, the injury was caused. The removal of the natural barrier did not of itself cause the waters to flood the plaintiff's land—had it done so there can be no doubt that the court would have come to a different conclusion.

In the case of Hollister vs. The Union Company 9 Conn. 435 was an action to recover damages occasioned by reason of

the defendant's turning the current of the Connecticut River so as to throw the same against the bank on the side where the plaintiff owned the land, whereby his land was gradually undermined and washed away. There is no allegation or pretense in the case that the defendant by his dams &c., so raised the waters of the River as to cause them to overflow its banks and flood plaintiff's land. Chief Justice Daggett in concluding his opinion clearly distinguishes the case from one where the land is taken for public use, either by flooding or otherwise: he says:

"The defendants have *not directly invaded* the property of "the plaintiff. They have not taken the property of the plain- "tiff for public use without just compensation. They have "not therefor brought themselves under the constitutional in- "terdiction; but they have under the sanction of the authori- "ty of the legislature to which appertained the power of regu- "lating a public navigable river, operated upon this river so as "to produce an inconvenience—A REMOTE AND CONSEQUENTIAL "INJURY TO THE plaintiff's land. For such an injury no action "can be sustained. On this ground the constitutional objec- "tion is sufficiently avoided."

The cases which hold that municipal corporations are not liable for injuries which result from the grading of streets all go upon the ground that the injuries are consequential; and that the acts complained of do not amount to a taking of private property for the public use. See

Waddell vs. Mayor of New York 9 Barb. 95
Redcliff vs. Mayor &c. of Brooklyn 4 N. Y. 195
Kavanagh vs. City of Brooklyn 38 Barb. 232
Wendell vs. Mayor &c. of Troy 39 Barb. 329.

If counsel for the defendant can find a case which holds that the state or municipal corporation can remove the soil from the street and spread it over and heap it up on the private property of persons adjoining such street, or that such corporations or the state in order to make a high grade, may extend the line of the embankment outside of the limits of the

street and on the property of a private citizen, without being liable in damages or making compensation therefor, then we will confess they have found a case supporting their doctrine.

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